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**DIGEST OF RECENT VIRGINIA DECISIONS.**

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**Supreme Court of Appeals.**

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

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**RUSSELL'S EX'RS *v.* PASSMORE et al.**

June 10, 1920.

[103 S. E. 652.]

1. **Trusts (§ 44 (3)\*)—Clear Evidence Necessary to Establish Parol Trust of Personality.**—Evidence to establish a parol trust in personality must be clear and unequivocal.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

2. **Trusts (§ 371 (2)\*)—Bill to Establish Parol Trust Held Sufficient as against Demurrer.**—A bill to establish a parol trust in personality consisting of certain bank stock brought against the executors of the trustee and requiring them to transfer the stock and to account for dividends held sufficient, as against demurrer, to establish that the trust as alleged was created and accepted by the trustee.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

3. **Trusts (§ 371 (2)\*)—Allegations of Parol Trust in Bank Stock Held to Disclose Irrevocable Interest in Cestui Que Trust.**—A bill to establish a parol trust in bank stock, alleging that the stock was delivered to the trustee subject to the express trust that it and its proceeds should be used for the benefit of complainant, held to show sufficient facts to constitute an irrevocable interest in him.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268 et seq.]

4. **Trusts (§ 44 (1)\*)—Evidence Held to Show Parol Trust in Bank Stock Revocable by Donor until Death.**—In a suit to establish a parol trust in bank stock, evidence held to sustain a finding that the trust was revocable by the donor at any time after its creation up to his death.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

5. **Trusts (§ 59 (1)\*)—Completed Trust Revocable Only by Consent of Beneficiaries.**—A completed trust without reservation of power of revocation can only be revoked by consent of all the cestuis.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 327.]

6. **Trusts (§ 59 (3)\*)—Parol Trust with Right of Revocation Held Good as Gift Causa Mortis or Express Trust on Donor's Death.**—Where, by the terms of a parol trust, bank stock is given to a trustee

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

in trust for donor's children subject to revocation by the donor prior to his death, the gift although by parol may be good as a gift *causa mortis* or as a gift by way of an express trust enforceable after donor's death if left unrevoked.

**7. Trusts (§ 59 (2)\*)—Reservation of Power of Revocation without Beneficiary's Consent May Be by Implication.**—While a trust completely created and containing no express power of revocation is not revocable by the creator without the beneficiary's consent, the power of revocation need not be express, but it is sufficient if it exists by necessary implication.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 327.]

**8. Evidence (§ 123 (7)\*)—Parol Deathbed Statement of Donor That Parol Trust Continued Held Admissible as *Res Gestæ*.**—In a suit to establish a parol trust of bank stock, a parol declaration of donor on his deathbed that the character of the trust had not been changed held admissible as *res gestæ*.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

**9. Trusts (§ 43 (1)\*)—Parol Declaration of Donor Held Admissible to Show Change in Beneficiary of Trust.**—In a suit against a trustee's estate to establish a parol trust of bank stock, a deathbed declaration of donor that he had partially revoked the gift as first made to his oldest son exclusively and had directed the trustee to hold the stock for the benefit of all donor's children held admissible.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

**10. Trusts (§ 61½\*)—Where Trust Incapable of Taking Effect, Subject Matter Passes to Heirs.**—Where a trust has become incapable of taking effect, neither the trustee nor his executors can hold the subject matter thereof, but it will pass to those who take under the disposition of the law.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 294.]

**1. Trusts (§ 44 (1)\*)—Evidence Sustaining Finding That Trust Had Been Partially Revoked and Enlarged.**—In a suit to establish a parol trust of bank stock as against trustee's estate, evidence held sufficient to establish that, after the original declaration and acceptance of the trust, the trust had been partially revoked by donor and a different and enlarged trust as to its objects had been created by directing the trustee to hold the subject of the trust for the benefit of all donor's children instead of only one as before.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 327.]

**12. Trusts (§ 43 (1)\*)—Statements by Deceased Trustee Recognizing Parol Trust Held Admissible.**—In a suit to establish a parol trust of bank stock as against a trustee's executors, testimony of a witness

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

giving his recollection of a statement made by the trustee relative to the existence of the trust held admissible.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 268.]

**13. Trusts (§ 217 (1\*))—Where Money Has Been Invested, Beneficiaries May Hold Trustee for Amount with Interest or Claim Property and Actual Profits.**—Where the subject of a trust is money and the trustee has invested such money in property, the beneficiaries have the option to hold the trustee or his estate liable for the money with interest, or the property in which it was invested with all actual profits when the rights of no third person intervenes.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 362.]

**14. Trusts (§ 21 (2\*))—Uncertainty as to One Beneficiary Held Not to Render Trust Invalid.**—Where a parol trust in bank stock had been created for the benefit of donor's children, uncertainty as to whether donor's youngest son was included held not sufficient to render the trust incapable of enforcement, since certainty as to the designated objects of a trust does not require certainty as to all of such objects or beneficiaries.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 269, 270.]

**15. Trusts (§§ 17, 18 (2\*))—Statute of Frauds Not Applicable to Express Parol Trust in Personalty Not to Be Performed within One Year.**—The statute of frauds (Code 1919, § 5561) held not applicable to an express parol trust of bank stock although its duties are not to be completely performed within one year.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 266, 267.]

**16. Limitation of Actions (103 (2\*))—Not Applicable to Express Parol Trust Not Terminated.**—The statute of limitations held not applicable to a continuing express parol trust of bank stock of which there has been no unequivocal denial or repudiation by the trustee.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 366.]

**17. Trusts (§ 366 (2\*))—Beneficiaries Held Entitled to Sue Executors in Their Own Names.**—The beneficiaries of an express parol trust in bank stock may sue in their own names by next friend to establish the trust as against the trustee's executors.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 373 et seq.]

**18. Trusts (§ 169 (1\*))—Substitute Trustee Held Not Necessary as against Trustee's Executors.**—In order to establish an express parol trust in bank stock as against the trustee's executors, it is not necessary that a substitute trustee be appointed by the court in place of the deceased trustee.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 373 et seq.]

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**19. Equity (§ 427 (1)\*)—Decree Establishing Trust in Favor of Several Beneficiaries Erroneous Where Bill Sought to Establish Trust as to One Only.**—Where the beneficiary under an express parol trust of bank stock sued to establish the trust, alleging that it was for his exclusive benefit, a decree establishing such trust for the benefit of complainant and also for other persons as objects of the trust as required by the evidence was erroneous, since the bill should have been amended under Code 1919, § 6104, so as to make its allegations conform to the proof before entry of the decree.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 34, 35.]

**20. Appeal and Error (§ 1170 (12)\*)—Entry of Decree Establishing Trust in Favor of More Beneficiaries Than Disclosed by Bill Held Harmless Error.**—Where a decree established an express parol trust in bank stock in favor of more beneficiaries than were alleged in the bill and such decree was supported by evidence, error in entering the decree without amending the bill held harmless, where it did not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 36.]

**21. Trusts (§ 316 (2)\*)—Decree Allowing Commissions on Disbursements Only Held Not Erroneous.**—In a suit to establish an express parol trust in bank stock as against the executors of a deceased trustee, a decree denying allowance of commissions except to the extent of 5 per cent. on disbursements actually made by the trustee in part execution of his trust held not erroneous.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 335.]

**22. Trusts (§ 316 (1)\*)—Commissions on Collection of Dividends Erroneous Where Trust Not Executed.**—In a suit to establish an express parol trust of bank stock as against trustee's executors, allowance of commissions on dividends collected by the trustee or his executors held erroneous where the trust had not been executed.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 335.]

**23. Trusts (§ 219 (2)\*)—Compound Interest on Dividends Held Not Chargeable against Trustee.**—In a suit to establish an express parol trust of bank stock as against the trustee's executors, compound interest on the dividends on the bank stock received by the trustee and his executors held not chargeable; there being no directions for an accumulation or evidence showing that trust moneys had been used by the trustee for his own benefit.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 352.]

Appeal from Circuit Court, Charlotte County.

Suit by George E. Passmore, Jr., and others, against the exec-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

utors of George B. Russell, deceased. Decree for plaintiffs and defendants appeal. Affirmed.

*Watkins & Woody*, of Charlotte, and *Henley, Hall, Hall & Peachy*, of Williamsburg, for appellants.

*George E. Allen*, of Victoria, and *W. R. Jones*, of Blackstone, for appellees.

COMMONWEALTH *v.* HERBERT et al.

June 10, 1920.

[103 S. E. 645.]

**1. Taxation (§ 861\*)—Procedure to Set Aside Assessment Governed by Subsequent Statute.**—A proceeding could be brought in the form provided by Act March 15, 1918 (Acts 1918, c. 238), for relief against an assessment of inheritance tax made prior to the passage of the statute.

**2. Appearance (§ 25\*)—General Appearance Waiver of Objection as to Form of Procedure.**—Where a petition was filed for relief against assessment of inheritance tax substantially in accord with Code 1919, § 2385, after the Act March 15, 1918 (Acts 1918, c. 238), was in force, the general appearance of the commonwealth without objecting to the form of the procedure was a waiver of any right to raise such an objection.

**3. Taxation (§ 856\*)—Inheritance Tax Not a Property Tax.**—The inheritance tax provided by Act March 22, 1916 (Acts 1916, c. 484), is not a property tax but a transmission or succession tax.

**4. Taxation (§ 861\*)—Inheritance Tax Laws Prospective unless Expressly Made Retroactive.**—Inheritance tax laws, like other tax laws, are prospective in operation, unless made retroactive, and apply only to the estates of decedents who have died since their enactment, although passed before distribution and although a will is filed and probated after the passage of the statute.

**5. Taxation (§ 30\*)—Tax Must Be Clearly Embraced in Statute.**—No tax shall be exacted from the citizens of the commonwealth except in those cases which are clearly embraced in the taxing statute.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 79.]

**6. Taxation (§ 861\*)—No Tax on Contingent Remainder under Will Executed Prior to Statute.**—Act March 22, 1916 (Acts 1916, c. 484), does not apply to contingent remainders created under the will of a testator whose death occurred in 1890 before any inheritance tax act was passed.

Error to Circuit Court, Loudoun County.

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.